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Supreme Court of the United States

October Term, 1971

No. 70-63

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

No. 70-65

TEXAS STATE TILE & TERRAZZO COMPANY, INC., *et al.*,
Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of Plasterers' Local Union No. 79, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 121 national and international unions whose jurisdictions cover the full gamut of this country's industrial life. These unions have a total membership of approximately 13,500,000 working men and women and the Federation is thus the majority spokesman for all facets of the labor movement.

Section 10(k) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*, allows the parties to a jurisdictional dispute 10 days after a § 8(b)(4)(D) unfair labor practice charge is filed to "agree upon methods for the voluntary adjustment of the dispute" and directs the Board to quash the notice that it will hear and determine the dispute when such an agreement is consummated. The Board rule in question here, the practical effect of which is to grant employers the right to compel a § 10(k) hearing in every case, deprives unions of the right to utilize this permission to the fullest.

The proper construction of the abstention provision of § 10(k) is of vital interest to every one of the Federation's affiliates. Each working man's livelihood depends on the extent to which available work is allocated to the particular trade, class, or craft in which he is included. Thus the question of which group shall have the right to claim certain types of work is a matter of general and recurring significance. For this reason jurisdictional disputes may and do arise in every industry. They are not confined to the building and construction context in which the instant case arose. Indeed, the two leading decisions of this Court relevant here both arose in far different settings, *NLRB* v. *Radio &*

Television Broadcast Engineers (CBS), 364 U.S. 573 (broadcasting); *Carey* v. *Westinghouse,* 375 U.S. 261 (electrical manufacturing).

The disputes regulated by §§ 8(b)(4)(D) & 10(k) normally implicate questions of trade union jurisdiction. Such questions which have their root in the terms of the competing organizations' constitutions, and of their charters from the Federation, are peculiarly suited to internal solution by organized labor. And, as recognized in *CBS,* 364 U.S. at 580, the union movement has, in fact, continuously attempted to settle jurisdictional disputes through its own procedures. See also e.g. Taft, The AFL In The Time Of Gompers, pp. 185-212 (1957); Taft, The AFL From The Death of Gompers To The Merger, pp. 461-472 (1959). In many instances these efforts have borne fruit. In others they have failed, primarily because the adverse effects of a particular decision on the losing organization were so great that it chose not to comply in the absence of effective legal sanctions.

Congress was well aware of these efforts in 1947. And the debates on Taft-Hartley make it plain that §§8(b)(4)(D) & 10(k) were intended to be responsive to the view that it is "beneficial" that jurisdictional disputes be resolved "within [labor's] own ranks, where they properly should be settled," 93 Cong. Rec. 4035 (Senator Murray). The abstention provision of § 10(k) is the means Congress chose to protect the labor movement's opportunity for internal resolution of such disputes. By its plain terms it gives the competing employee groups (the parties to the jurisdictional dispute) a last chance to resolve the matter by them-

selves prior to the invocation of compulsory arbitration, the sanction Congress mandated to "[stimulate] labor organizations to set up appropriate [internal settlement] machinery." *Ibid.* The Board's rule that employers can force a § 10(k) hearing at will destroys this opportunity for inter-union settlement which Congress was careful to preserve. It is because of this profoundly destructive effect that the AFL-CIO wishes to take this opportunity to acquaint the Court with its views.

ARGUMENT

1. "The language of § 10(k) [of the National Labor Relations Act], supplementing § 8(b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled." *NLRB* v. *Radio & Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, 579. As a last resort that method provides for a Board decision as to "which of two or more employee groups claiming the right to perform certain work tasks is right." *Id.* at 586. To reduce the occasion for such Board determinations § 10(k) also provides that "the parties to the dispute out of which the [§ 8(b)(4)(D)] unfair labor practice shall have arisen" shall have 10 days after the filing of a charge alleging a jurisdictional strike, or the threat of such a strike, to either adjust, "or agree upon methods for the voluntary adjustment of, the dispute"; and that "upon such voluntary adjustment of the dispute" the § 8(b)(4)(D) charge shall be dismissed.

The question presented here, as stated by the Board, is whether the abstention provision of § 10(k) is applicable "where the competing unions have agreed upon a voluntary method of adjustment but the employer involved has not

consented to be bound by that procedure." Bd. Br. p. 2. The court below (2-1, Judges Leventhal and McGowan in the majority, Judge MacKinnon dissenting) answered this question in the affirmative in a comprehensive and fully reasoned opinion based on the "guidance and . . . instruction" of this Court's leading *CBS* opinion (A. 374) and a "fresh examination of the relevant legislative history" (A. 375). The Board would have it answered in the negative on the basis of a doctrine, first stated in a three-line *ipse dixit* (see *Los Angeles Building Trades Council (Westinghouse Corp.)*, 83 NLRB 477, 482 n. 7) and never subsequently explicated, which drew its essence from the overall view of §§ 8(b)(4)(D) & 10(k) discredited in *CBS*, and which the Board has failed to reexamine in light of that decision, which "should have alerted the Board to modify its interpretation" (A. 378). And in the instant case, as in *CBS*, it is the lower court, rather than the Board, which has correctly discerned Congress's plan for regulating jurisdictional disputes—as we now demonstrate.

2. As this Court has explicitly recognized, labor-management controversies precipitated by an employer's decision to use one group of employees rather than another "to do the same work under similar conditions of employment" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 213, 218), fall within the class of basic economic issues that the NLRA directs shall be settled by free "collective bargaining with the right to strike at its core" (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82). For such decisions, whether they take the form of subcontracting the work to another employer, transferring the work from one bargaining unit to another, or hiring one group of specialized workers rather than another, lie outside the "core of entrepreneurial con-

trol" (*Fibreboard*, 379 U.S. at 233, Stewart J., concurring) and constitute a direct threat to "the maintenance of the basic wage structure" of the affected group (*Local 24 Teamsters* v. *Oliver*, 358 U.S. 283, 294). Work assignment questions may, however, create not one disagreement but two: the basic employer-employee controversy as to who shall *do* the work, and an ancillary dispute between competing groups of employees as to which group shall have the right to *claim* the work. When a conjunction of the two occurs, a stable settlement of the employer-employee controversy through the normal means of private resolution contemplated by the Act is all but impossible. For there is no way for the employer to satisfy two or more employee groups, each of which wants the same work, and each of which has the right to use economic force. See *CBS*, 364 U.S. at 582.

This threat to the smooth and equitable functioning of the labor relations system is open to two basic legislative solutions. First, to perfect the process for the private ordering of employer-employee work assignment controversies by a legal rule which insures that no more than one of the competing employee groups shall have the right to contest a work assignment. The focus of such a reform is the regulation of "disputes between two or more groups of employees" (*CBS*, 364 U.S. at 579) with the end in view of protecting "employers caught in the crossfire between the disputing unions" (A. 375). Second, to reject the private dispute settlement process in this area as unworkable and to replace it, in those instances in which the employees attempt to use self-help to protect their interests, with binding compulsory arbitration determinations as to who shall do the work in question. The aim of this reform is

to insure that work assignments shall be made by the employer, or a third party, free of employee economic pressure rather than by a process in which "the use of economic pressure" is accepted as "part and parcel of the system" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489).

If Congress had adopted the second of these alternatives, it would, to use the Board's words, have "designed a structure for settling [work assignment] disputes that would bind the employer to a settlement . . . and require specific action by him," and as the Board concludes, it would be "highly unlikely" that such a regime would recognize a settlement to which the employer "was not a party and in which he had no voice." Bd. Br. pp. 19-20. Instead of taking that course in enacting §§ 8(b)(4)(D) & 10(k), however, Congress chose the first alternative noted above. And in view of that choice Judge Leventhal necessarily concluded that employer "resistance 'could [not] be the sole factor making inoperative' the 'voluntary adjustment' abstention provision of § 10(k)" (A. 379), for the congressional plan only grants "[a]n employer . . . standing . . . when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree" (A. 383).

3. It is now beyond question that the purpose of §§ 8(b)(4)(D) & 10(k) is to "get jurisdictional disputes settled." *CBS*, 364 U.S. at 579. The structure and language of § 10(k), the legislative history, and the overall structure and theory of the Act all demonstrate, as this Court squarely held in *CBS*, that the dispute the Board is empowered to resolve is the "dispute between two or more groups of em-

ployees over which is entitled to do certain work for an employer" (364 U.S. at 579).

The structure of §§ 8(b)(4)(D) & 10(k) makes it perfectly plain that the Board has not been granted the authority to settle work assignment controversies between employers and employees, for employers are not bound by the Board's dispute determination. If the employer adheres to his assignment notwithstanding the Board's decision, he does not commit an unfair labor practice and he cannot, therefore, be subjected to public sanctions. Correlatively, the employee group which prevails in a § 10(k) hearing does not secure the right to do the work in question. It secures only the right to claim that work and to support its demand with economic force without committing the unfair labor practice defined in § 8(b)(4)(D). Finally, the losing employee groups before the Board are not forbidden to perform the work if their employer chooses to give it to them. What they lose is the right to demand that work through the use of economic force. In short, the sole function of §§ 8(b)(4)(D) & 10(k) is to prevent strikes growing out of an unresolved dispute between competing employee groups, and to ensure that once that dispute is settled only one of the groups will be able to strike or picket an employer; thereby facilitating the normal process of private labor-management decision-making by safeguarding the employer against being "caught in a crossfire between disputing unions" (A. 375).

The relevant statutory language likewise compels the conclusion that the Board's power is limited to the settlement of inter-union disputes. The final sentence of § 10(k) states: "Upon compliance by the parties to the dispute with the decision of the Board or upon . . . voluntary ad-

justment of the dispute, [the § 8(b)(4)(D)] charge shall be dismissed." Since, as pointed out above, § 8(b)(4)(D) imposes no legal obligations upon employers, the concept of *employer* compliance is meaningless. The clear implication of the foregoing is thus that the dispute is one between the competing employee groups—the parties that are legally obliged to comply with a Board determination. Moreover, the Act directs the Board "to hear and determine the dispute out of which [the § 8(b)(4)(D)] unfair labor practice shall have arisen." The activity condemned by § 8(b)(4)(D) is the strike growing out of unresolved competing employee claims. And the foregoing language indicates that there is a distinction between such strikes and the "dispute" which the Board is directed to determine. The fact that such a distinction is recognized leads to the conclusion that the Board is to settle the "jurisdictional dispute," i.e., the dispute between the competing employee groups, and that it is not, as it suggests, empowered to determine "the dispute over the jurisdictional strike to which the employer is obviously a party" (Bd. Br. p. 26). Indeed that dispute is settled automatically by the issuance of a § 10(l) injunction. A. 372-374.

The definition of the term "dispute" in *CBS* was adopted after a full consideration of the legislative history. See 364 U.S. at 581-582. And the additional material set out by the lower court after its "fresh examination" (A. 375) of that history serves only to reinforce the validity of this Court's reading of the Act. For it is the inevitable result of a fair consideration of the relevant materials; the authoritative explanations of the purpose of the jurisdictional dispute provisions, at every step of their evolution, allow for no

other construction. The Board has been able to adhere to the opposite result only because it has never confronted the legislative history.

In calling for legislation on this subject President Truman characterized the problem as a "form of union disagreement . . . involving the question of which labor union is entitled to perform a particular task." 93 Cong. Rec. 136. The House Report on §§ 2(15) & 12(a)(3)(A) of H.R. 3020, 80th Cong., 1st Sess., which provisions closely tracked § 8(b)(4)(D) standing alone and before § 10(k) was added to it, states that jurisdictional strikes "do not arise out of any dispute between an employer and employees" and that they "usually involve quarrels . . . between rival unions, which use the strike weapon against each other." House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 23-24. And the court below noted:

> "Senator Morse, who proposed the forerunner provision which emerged, with relatively minor modification, as § 10(k), prepared a 'definitional' memorandum, which stated that while there are various kinds of 'jurisdictional disputes' they 'have as their common ingredient a controversy between two or more labor unions.' " A. 375-376.

Finally, the House Conference Report, which was prepared after Taft-Hartley had reached its final form, stated:

> "This section [10(k)] would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." House Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 57.

Of equal importance, we have been unable to find, and the briefs of the petitioners and the *amici* supporting their position do not cite, any legislative materials that would

support the conclusion that a proponent of §§ 8(b)(4)(D) & 10(k) squarely proposed, or even that Congress squarely considered, the proposition that the Board should have the power to settle work assignment controversies between employers and employees through the system of compulsory arbitration mandated by § 10(k). As noted in point 2 above, those controversies implicate a basic economic issue which directly affects the employees' vital interests, and which lies outside the "core of entrepreneurial control." "[P]rivate bargaining [concerning such issues] under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" is the "fundamental premise on which the Act is based." *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108. Indeed, the Congress that enacted §§ 8(b)(4)(D) & 10(k) into law was so jealous of that fundamental premise that it also added § 8(d) to the Act "to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *Insurance Agents*, 361 U.S. at 487; see also *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404. And the essence of the generative principle which guided Congress was set out by Senator Taft in the following terms:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract . . .
>
> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages,

> prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy." 93 Cong. Rec. 3835.

In short, "[c]ollective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Bus Employees* v. *Missouri,* 374 U.S. at 82. Thus, the conclusion that §§ 8(b)(4)(D) & 10(k) are not to be interpreted as granting the Board, rather than employers and employees, the power to settle work assignment controversies, is compelled. To paraphrase Mr. Justice Harlan's concurring opinion in *National Woodwork Mfrs. Assoc.* v. *NLRB,* 386 U.S. 612, 649-650:

> "In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of [economic action] as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of . . . an opaque legislative record, a purpose to outlaw . . . [all] collective bargaining and [strike] conduct [aimed at settling employer-employee work assignment controversies] . . . [T]his Court should not take such a step until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solutions in this elusive aspect of our economy."

4. Judge Leventhal reasoned that:

> "Since a jurisdictional dispute for purposes of § 10(k) is a 'dispute between two or more groups of employees,' it follows that these employee groups are 'the parties to such dispute' for purposes of determining whether

there exists a voluntary adjustment procedure within the abstention provision of 10(k)." A. 374.

This definition of the term "parties" follows ineluctably from three separate lines of analysis.

First, as Judge Learned Hand stated, normally "[l]egal interpretation involves an imaginative projection upon the occasion that has arisen of what would have been the choice of the lawmakers . . . [The judge] is called upon to ascribe to others a decision that they never actually forecast by fabricating fictitious appraisals," quoted in Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col. L. Rev. 1363, 1393-1394 n. 155. Here no such "imaginative projection" is necessary. Senator Morse, the sponsor of § 10(k), provided an exact description of the model upon which that Section was based, and in the course of his discussion of the incident which stimulated the plan he proposed, and which became the law, he explicitly stated that the provision allowing the parties a period of time after a strike growing out of a jurisdictional dispute first erupts to resolve the matter was designed to "give union leaders [an opportunity] to settle" their differences:

> "I noticed, as a member of the War Labor Board during the war, that there was tremendous opposition to our exercising jurisdiction over certain types of work stoppages, such as the jurisdictional dispute, which we knew could not be justified on any basis by those participating in the dispute. I remember very clearly a night when we had a very serious stoppage of work in one of the vital war plants of the country because of a jurisdictional dispute. I then proposed that unless the workers went back to work at the next shift the Board should appoint an arbitrator whose decision

should be final and binding. Labor vigorously opposed my position.

"In that particular case the Board took a recess, and in 10 minutes one of the labor representatives came back and stated that the men had been ordered back to work by the union. That is the way they preferred it. That is the way I prefer it, too. But we could not take a chance. Therefore, I offered a resolution, which became the policy of the Board, with labor dissenting at the time it was adopted, which provided that for the duration of the life of the War Labor Board we would give the union leaders involved in a jurisdictional dispute 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding.

"What I wish to stress is the remarkable compliance we obtained so far as the quick settlement of jurisdictional disputes was concerned, once the resolution became the policy and procedure of the Board.

"I think it ought to be frankly stated here this afternoon that probably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments. I am not being fooled in regard to this question. The point I wish to emphasize is that I believe that declaring certain actions to be unfair labor practices will be preventive of some of the abuses which we seek to cure, because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." 93 Cong. Rec. 1844-1845.

The foregoing makes it manifest: first, that where there is a strike, or the threat of a strike, growing out of a jurisdictional dispute, which is the pre-condition for the applicability of §§ 8(b)(4)(D) & 10(k), the resulting work stoppage must be halted, and, as the lower court pointed out, that is the function of § 10(l) (A. 372-374); second, the strike having been halted, the "union leaders involved" are to be given a period of time "to proceed to settle the dispute"; third, "upon their failure to do so . . . an arbitrator [i.e., the Board] whose decision would be final and binding" is to settle the inter-union dispute; and fourth, once that dispute is settled the employer and the employees are to be remitted to the normal private processes for the resolution of their disagreements. As the lower court observed, in light of this explanation by the provision's sponsor, "there can be no doubt that the parties to the jurisdictional dispute were conceived of as the rival unions, or employee groups" (A. 377).

Second, Judge Leventhal concluded that Congress intended to protect the employer interest in "neutrality," i.e., in being free of "the crossfire between the disputing unions and unable to satisfy either" (A. 375). The doctrine that the employer is a necessary party to a voluntary method of adjustment grants him the right to choose the forum in which the inter-union dispute shall be decided and not simply the right to be heard. Indeed in the instant case the employer refused to participate in an arbitral proceeding that was open to him. A. 370 n. 10. The limited employer interest in "neutrality" is an insufficient basis upon which to rest a veto power having such profound implications. For "[t]he purpose of protecting the neutral em-

ployer is fully served by *any* binding settlement between the disputing employee groups." A. 375 (emphasis added).

There can be no doubt that the lower court's definition of the employer interest the Act was intended to protect captures the congressional understanding. This Court, drawing on the legislative history of § 8(b)(4) in its entirety has concluded that all of the subsections of that provision are "limited to protecting employers in the position of neutrals between contending parties." *National Woodwork,* 386 U.S. at 625. Consistent with that insight, the theme of the debates on §§ 8(b)(4)(D) & 10(k) follows the note struck in House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 23, which characterized the employers caught in jurisdictional disputes as "the helpless victims of quarrels that do not concern them at all." See e.g. the remarks of Representative Landis: "Innocent employers should not be penalized because unions force a strike to settle difficulties between unions" (93 Cong. Rec. A-1222); Senator Ellender: "[D]isputes often arise between unions as to the division of [steel erection] work. In cases of that kind both owner and contractor are helpless . . . [I]n the brewery industry there still persists the fight between brewery workers and teamsters . . . the brewery owners are helpless" (93 Cong. Rec. 4132); Senator Murray: "[J]urisdictional disputes inflict incalculable harm upon the fair-dealing, law-abiding union employer" (93 Cong. Rec. 4905); and Senator Ball: "[E]mployers often are the innocent victims, the secondary victims, so to speak, of such practices" (93 Cong. Rec. 5015).

In contrast, the congressional debates contain no support for the proposition, advanced by the Board (Bd. Br. 18-20),

that §§ 8(b)(4)(D) & 10(k) are based on the premise that employers have a "vital [economic] interest" in the *manner* in which competing employee groups settle their jurisdictional disputes. So far as we are aware the debates do not contain a single criticism of the terms of an inter-union resolution of a dispute. Senator Murray's statement that it is "beneficial" that such disputes be resolved "within [labor's] own ranks, where they properly should be settled" (93 Cong. Rec. 4035) reflects a broad consensus. Indeed, the primary criticism of the labor movement was that the number of settlements it had achieved was insufficient. Thus Representative Hartley concluded his discussion of a jurisdictional dispute between the Carpenters and Laborers in New Jersey by noting:

> "Both carpenters and laborers are satisfied to get back to work. But why is it they cannot? It is because Mr. Hutcheson, the head of the carpenters, and Mr. Moreschi, the head of the laborers here in Washington, have refused to get together and settle this jurisdictional dispute. They could do it overnight if they had the will to." 93 Cong. Rec. 3425.

And Senator Morse took that criticism into account in shaping § 10(k). For he noted that "one of the greatest benefits" of his proposal would be that "the unions themselves" when faced with the threat of a Board determination "will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." 93 Cong. Rec. 1845.

Thus the argument that § 10(k) was intended to insure employers a voice in settling inter-union disputes fails for the want of a proper predicate in the legislative history.

For, as Judge Hand noted, in the last sentence of the statement quoted in part on p. 13 *supra*, the proper role of the courts when interpreting statutory language is to "reconstitute the gamut of values current at the time when the words were uttered" (62 Col. L. Rev. at 1394 n. 155).

Finally, as noted in point 3 above, employers are not bound by the Board's dispute determinations. The statutory scheme preserves their right to protect their economic interests through self-help, and the employer who adheres to his original assignment does not commit an unfair labor practice. This being so, the basic concepts of equity counsel against a construction of the Act which allows employers to require resort to Board dispute determinations, thereby thwarting the desire of the competing employee groups to settle the matter through a voluntary method of adjustment. As the court below stated:

> "Our understanding of the thrust of Federal labor policy as developed by Congress proceeds along lines congruous to those developed by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks*, [398 U.S. 235]. There the Court reversed a ruling of but nine years standing in order to maintain the efficacy of the arbitration remedy—viewed in the large as furthered by an injunction preserving the status quo pending the arbitral process. The Court stressed the importance of mutuality—that an employer could not be held to his contract to pursue the arbitration remedy if he could not obtain effective relief (including pendente lite injunction) to enforce the union's similar obligation. Our situation is marked by technical differences but similarity in principles. As we have noted, Board abstention under § 10(k) in favor of an arbitration agreement is accompanied by injunctive relief to main-

tain the status quo pending the conducting of the arbitration and the enforcement of the award. And the pattern we find in the Act avoids a lack of mutuality since the employer cannot interfere with arbitration on the ground that he desires to permit the Board to conduct a proceeding and issue an order that he is not obligated to observe." A. 386.

5. In the final analysis, the Board's position here rests on the proposition that 23 years of undisturbed adherence to a rule of law creates a proscriptive right to error. This is a variant of the Board's position in *CBS* that 12 years was sufficient to make the Board's construction of §§ 8(b)(4)(D) & 10(k) "a part of the statute." See 364 U.S. at 585. It is not surprising that the Board should be driven to the same last resort in both cases, for the doctrine at issue in *CBS*, and the doctrine in question here, are two interrelated corollaries of the Board's original approach to those provisions.

It was early recognized that the secondary boycott provision, § 8(b)(4)(B), "could not be literally construed; otherwise, it would ban most strikes historically considered to be lawful . . ." *Local 761 IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 672. In construing the jurisdictional dispute provisions, however, the Board proceeded without due consideration for the limitations imposed by § 13 (compare *National Woodwork*, 386 U.S. at 643), or the basic proposition that "it is the entire Act, and not merely one portion of it, which embodies 'the definitive statement of national policy.'" *Local 1424 Machinists* v. *NLRB (Bryan Mfg. Co.)*, 326 U.S. 411, 418 n. 7. Focusing on the bare words of § 8(b)(4)(D), to the exclusion of the added insights into Congress' intent to be gleaned from § 10(k) and the

legislative history, the Board concluded that the Act protected the employer interest in making "work assignments without being subject to strike pressure to compel a different assignment" unless his action was inconsistent with a pre-existing legal obligation imposed by a Board certification or an agreement to which he was a party. See *Local 173 Lathers (Newark and Essex Plastering)*, 121 NLRB 1094, 1107-1109; *Local 16 ILWU (Juneau Spruce)*, 82 NLRB 650, 655-656.

This approach affected the formation of the § 10(k) law in two ways. First, as the Court recognized in *CBS*, it led to the Board's conclusion that a decision that the striking union "was not entitled to have the work assigned to its members because it had no right to it under either an outstanding Board order or certification . . . or a collective bargaining agreement" required an affirmance of the employer's assignment. See 364 U.S. at 577-578, 582-583. Second, it led to the doctrine at issue here, that arbitral determinations to which the employer was not a party were without force and effect in a § 10(k) proceeding. That doctrine was first announced as a substantive rule derived from the decisions in *Juneau Spruce* and *Marine Cooks (Irwin Lyons Co.)*, 82 NLRB 916, in a case in which the union raised the award as a defense on the merits and did not seek to have the § 10(k) notice of hearing quashed on the basis of the abstention provision. The Board simply stated: "As Westinghouse was not a party to any AFL awards of jurisdiction, we find no merit to the Trades Council's contention that such awards in its favor are determinative in this case." *Los Angeles Building Trades Council*, 83 NLRB at 482 n. 7. And as the Employer's brief

candidly admits, from that point on the Board has simply "couched its determination in statutory terms" and after fulfilling that formality has ruled that the abstention provision did not apply where the employer was not a party to the private settlement. Texas Tile Co. Br. pp. 15-16. Thus the Board's rule was evolved, and has been followed, without any attempt by the agency to face up to, much less do business with, the language and structure of § 10(k) or that provision's legislative history.

In a closely related context the Board has squarely recognized that this Court's opinion in *CBS:*

> "... not only rejected the type of determination made in that case and in the instant case but rejected also the Board's underlying view of the scope and interplay of Sections 8(b)(4)(D) and 10(k). Thus, although the facts in the instant case, as heretofore found, might be deemed to fall within the *literal* terms of the Section 8(b)(4)(D) proscription, the Supreme Court noted in *CBS* that Section 8(b)(4)(D) does not stand alone but is supplemented by Section 10(k). The two provisions must be read together. So read, the provisions apply, as the Supreme Court noted, to disputes between 'two or more employee groups claiming the right to perform certain work tasks . . .' 364 U.S. 573 at 586.
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> "The thrust of the *CBS* decision was, to be sure, directed at the Board's misconception of the kind of determination required by Section 10(k). But, in terms, the Supreme Court said it was 'the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision.' 364 U.S. 573, at 585. Implicit in this directive is the proposition that Sec-

> tions 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved." *Local 107 Teamsters (Safeway Stores)*, 134 NLRB 1320, 1322.

On this basis the Board reversed its conclusion, arrived at prior to *CBS*, that §§ 8(b)(4)(D) & 10(k) reach strikes which do not grow out of "disputes between rival groups of employees." *Ibid.* Pursuant to its *Safeway* doctrine the Board has held that a disclaimer of the work in question by one of the competing employee groups constitutes a voluntary adjustment which requires Board abstention. See e.g., *Local 1905 Painters (Butcher & Sweeney)*, 143 NLRB 251; compare A. 383-384. Section 10(k) accords equal dignity to such adjustments and to agreements for the voluntary adjustment of the dispute. For a commitment by a union to submit to binding arbitration is an undertaking to renounce the right to claim the work in the event of an adverse decision. It follows that in this case, as in *Safeway*, if the principles of *CBS* are applied rather than ignored, inter-union action to resolve a dispute must be deemed sufficient to satisfy the abstention provision.

CONCLUSION

For the reasons set out above, as well as those stated by Plasterers' Local Union No. 79, the decision below should be affirmed.

Respectfully submitted,

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